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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

EARL JENTZ,

Plaintiff and Appellant,

v.

CITY OF CHULA VISTA et al.,

Defendants and Respondents.

D055401

(Super. Ct. No. 37-2007-00063502-  
CU-WM-SC)

APPEAL from a judgment of the Superior Court of San Diego County, William S. Cannon, Judge. Affirmed.

Plaintiff Earl Jentz appeals a judgment in favor of defendant City of Chula Vista (the City) denying his petition for a writ of mandate to set aside the City's adoption of a specific plan, known as the Urban Core Specific Plan (UCSP), for the development and revitalization of the City's downtown area or urban core. Jentz contends (1) the UCSP violates the City's Controlled Residential Development Ordinance, which the City's voters adopted by a ballot initiative known as the Cummings Initiative; (2) the UCSP

violates the City's "Growth Management Ordinance" (GMO), which the City adopted to implement the Cummings Initiative; and (3) the City's adoption of the UCSP violates elementary principles of administrative law because it is not internally consistent and logical, it is not consistent with applicable law, and it is not supported by substantial evidence in the record. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

In 1988 the City's voters adopted the Cummings Initiative (the Initiative), which is codified in the City's Municipal Code as chapter 19.80,<sup>1</sup> entitled "CONTROLLED RESIDENTIAL DEVELOPMENT." The Initiative included the finding that the City was "experiencing a period of intense residential development which adversely affects the health, safety and welfare of the citizens of Chula Vista." Among other adverse effects, the Initiative noted the intense development had "overloaded the capacity of the city streets and thoroughfares to move traffic safely[ and] efficiently, and [had] failed to meet traffic demands."

The Initiative's "Statement of purposes and intent" likewise explained that unprecedented residential growth had seriously impacted "the city's traffic flow, schools, street maintenance, water and sewage services, environmental quality and . . . overall quality of life." The stated purpose of the initiative was "to qualify an effective and fair growth management ordinance . . . that will control growth and protect the quality of life.

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<sup>1</sup> All section references will be to the Chula Vista Municipal Code unless otherwise specified.

This measure is not designed to halt quality growth, but to ensure that rampant, unplanned development does not overtax facilities and destroy the quality and home town character of Chula Vista."

Section 19.80.030 of the Initiative directed the city council to include in the City's revised general plan<sup>2</sup> "a specific element known as the 'public services and facilities element.' " The stated purpose of that element "is to ensure development shall not occur in the city of Chula Vista that would degrade existing public services and facilities below

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<sup>2</sup> Government Code section 65300 requires cities and counties, including charter cities like Chula Vista, to adopt long-term general plans for the physical development of the county or city. (Gov. Code, § 65300.) A general plan must contain the following elements: land use, circulation, housing, conservation, open-space, noise, and safety. (Gov. Code, § 65302.)

Regarding specific plans, Government Code section 65450 states: "After the legislative body has adopted a general plan, the planning agency may, or if so directed by the legislative body, shall, prepare specific plans for the systematic implementation of the general plan for all or part of the area covered by the general plan."

Government Code section 65451 sets forth the required contents of a specific plan as follows: "(a) A specific plan shall include a text and a diagram or diagrams which specify all of the following in detail:

"(1) The distribution, location, and extent of the uses of land, including open space, within the area covered by the plan.

"(2) The proposed distribution, location, and extent and intensity of major components of public and private transportation, sewage, water, drainage, solid waste disposal, energy, and other essential facilities proposed to be located within the area covered by the plan and needed to support the land uses described in the plan.

"(3) Standards and criteria by which development will proceed, and standards for the conservation, development, and utilization of natural resources, where applicable.

"(4) A program of implementation measures including regulations, programs, public works projects, and financing measures necessary to carry out paragraphs (1), (2), and (3).

"(b) The specific plan shall include a statement of the relationship of the specific plan to the general plan."

Government Code section 65454 states: " No specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan."

acceptable standards until all additional necessary public services and facilities required for that development are assured or scheduled for timely completion as determined by the city council in accordance with but not limited to [certain specified] criteria."

(§ 19.80.030.)

The Initiative placed certain restrictions on the City's power to rezone property. It provided that the rezoning of property designated for residential development is "permitted only to the next highest residential density category in any two year period according to the following schedule: A Agricultural Zone [¶] R-E Residential Estates Zone [¶] R-1 Single Family Residential Zone [¶] R-2 One- and Two-Family Residential Zone [¶] R-3 Apartment Residential Zone." (§ 19.80.070(A).) The Initiative also provided that "[r]ezoning commercial or industrial property to a residential zone shall be permitted only to the maximum residential density corresponding to the potential traffic generation that was applicable prior to the rezoning to residential." (§ 19.80.070(D).)

In 1991 the City enacted the GMO, which, in accordance with the Initiative, states, under the heading "Purpose and intent," that it is the policy of the City to "[p]revent growth unless adequate public facilities and improvements are provided in a phased and logical fashion as required by the general plan." (§ 19.09.010(A)(6).)<sup>3</sup> The GMO

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<sup>3</sup> The GMO reiterates this point in the "Purpose and intent" section by additionally stating that it is the policy of the City to "[p]rovide that public facilities, services and improvements meeting city standards exist or become available concurrent with the need created by new development" (§ 19.09.010(A)(3)) and to "[c]ontrol the timing and location of development by tying the pace of development to the provision of public facilities and improvements to conform to the city's threshold standards and to meet the goals and objectives of the growth management program." (§ 19.09.010(A)(7).)

required the city council to adopt a growth management program "[t]o implement the city's general plan and to provide that development does not occur unless facilities and improvements are available to support that development." (§ 19.09.030(A).)

The GMO set forth "quality of life threshold standards" for various public facilities and improvements. (§ 19.09.040.) With respect to traffic, the GMO adopts the following standards: "1. City-wide. Maintain LOS<sup>[4]</sup> 'C' or better as measured by observing average travel speed on all signalized arterial segments; except[] that during peak hours a LOS 'D' can occur for no more than two hours of the day. [¶] 2. West of Interstate 805. Those signalized intersections which do not meet the standard above may continue to operate at their current (year 1991) LOS, but shall not worsen."

(§ 19.09.040(I).)

In December 2005 the city council adopted a revised general plan (the General Plan) to function as the City's "'constitution' for future growth and development" through the year 2030, paying "particular attention to Smart Growth principles being promoted throughout the country, California, and our region." In its land use and transportation

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<sup>4</sup> As explained in the City's 2005 General Plan, "Level of Service (LOS) is a measure of actual traffic conditions and the perception of such conditions by motorists. It is used to describe the average daily number of vehicles on a street relative to the street's vehicular capacity and the resulting effect on traffic. There are six defined Levels of Service, A through F, which describe conditions ranging from 'ideal' to 'worst' . . . ." LOS A describes free-flowing traffic at average travel speeds with little delay and minimal delays at intersections. On the other end of the spectrum, LOS F describes conditions where "[a]rterial traffic flows at extremely slow speeds[;] intersection congestion occurs with excessive delays; and back ups from other locations restrict or prevent movement."

element, the General Plan explained that specific plans "are customized regulatory documents that provide more focused guidance and regulation for particular areas. They generally include a land use plan; circulation plan; infrastructure plan; zoning designations; development standards; design guidelines; phasing plan; financing plan; and implementation plan." The General Plan noted that the City had approved eight specific plans and that one for the City's urban core (the UCSP) was under preparation.

The city council initiated preparation of the UCSP in 2003 and it was drafted concurrently with the General Plan. In 2004 the City retained a consulting firm to assist its staff in preparation of the UCSP and appointed an 18-member advisory committee to work with the staff, the consulting firm, and the community in developing major components of the UCSP.

In May 2006, after receiving input on a preliminary draft of the UCSP from the advisory committee and the community, the City released a "Public Review Draft" of the UCSP along with a draft environmental impact report (DEIR). The DEIR explained that the City's urban core encompasses an area of about 1,700 acres, but the focus of the UCSP was a 690-acre area that "was determined to be most in need of redevelopment due to conditions of blight and underutilization." The UCSP was intended to "refine and implement the vision for downtown Chula Vista expressed in the City's [General Plan]." It called for various zoning changes to allow development of "an integrated and connected network of three distinct neighborhoods and districts, including the Village, Urban Core, and Corridors districts. (For planning purposes . . . these three districts are divided into a total of 26 subdistricts. Each district would contain a mix of primarily

low-to mid-rise (45 to 84 feet in height) high-density commercial, office, and residential uses and various public amenities such as improved pedestrian streetscapes, bicycle and transit facilities, public art, and parks, plazas and paseos. Two high-rise (up to 210 feet in height) Transit Focus Areas would be permitted in the areas surrounding the existing E and H Street trolley stations."

On May 30, 2006, the City gave notice that the DEIR and proposed UCSP were available for public review, with the public review period for the DEIR to end on July 13, 2006. In October 2006 the City's Planning Commission held a public hearing on the UCSP. At that hearing, Jentz, through his counsel, and a member of the planning commission raised the concern that certain zoning changes in the UCSP violated the Initiative's restrictions on the City's power to rezone property. The UCSP proposed the rezoning of certain properties from their current designation of R-1, R-2 or R-3 to new zoning designations of "Mixed Use" or "Urban Core Residential," which did not exist at the time the Initiative was adopted. Jentz argued that the increased residential density allowed by these zoning changes violated the Initiative's restriction permitting increased-density rezoning of residential property only to the next highest residential category in any two-year period, and its restrictions on rezoning from residential to commercial and commercial to residential. (§ 19.80.070(A) & (D).)

To address these concerns, City staff proposed amendments to section 19.80.070(A) of the Initiative and chapter 19.07 of the Municipal Code (regarding specific plans). Under the proposed amendments, areas zoned or proposed to be rezoned as part of a specific plan would be deemed to be in compliance with the Initiative's

zoning provisions, provided the specific plan conformed to the requirements of chapter 19.07, including the requirement of a finding by the planning commission that the demands on public facilities and services caused by the development allowed by the specific plan would be mitigated in advance of or concurrent with the development, in conformance with the GMO.

The city council did not adopt the proposed amendments. Consequently, City staff removed areas zoned R-1, R-2, and R-3 from the UCSP subdistricts. In April 2007 the city council passed a resolution certifying the final environmental impact report (FEIR) and adopting a mitigation monitoring and reporting program for the UCSP. The council also approved an ordinance adopting the UCSP on its first reading in April 2007 and on its second reading in May 2007.

In June 2007 Jentz filed his petition for writ of mandate challenging the City's approval of the UCSP. The parties filed briefs on the petition in accordance with a stipulated briefing schedule and presented oral argument in January 2009. At oral argument, Jentz argued, for the first time, that the UCSP violated the zoning restrictions in the Initiative by rezoning a subdistrict designated as UC-15 from commercial to 90 percent residential. Because Jentz had not raised that issue in his briefs, the court gave the parties the opportunity to file supplemental briefing addressing the issue.



After the parties filed their supplemental briefs, the court took the matter under submission. On March 20, 2009, the court issued a minute order denying the petition for writ of mandate. The court entered judgment denying the petition on April 22, 2009.<sup>5</sup>

## DISCUSSION

### *Standard of Review*

The City's adoption of the UCSP is a legislative decision subject to review through ordinary mandamus under Code of Civil Procedure section 1085. (*Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303 (*Mike Moore's 24-Hour Towing*).) "[W]hen review is sought by means of ordinary mandate [under Code of Civil Procedure section 1085 ], 'judicial review is limited to an examination of the proceedings before the [agency] to determine whether [its] action has been arbitrary, capricious, or entirely lacking in evidentiary support, or whether [it] has failed to follow the procedure and give the notices required by law.'" (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35, fn. 2.) "[W]hether the agency's

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<sup>5</sup> In addition to two "writ of mandate" causes of action under Code of Civil Procedure sections 1085 and 1094.5, respectively, Jentz's petition/complaint contained a cause of action for injunctive relief seeking to restrain "illegal expenditure[s]" in connection with the UCSP and a cause of action for declaratory relief seeking a judicial declaration that the UCSP violates the Initiative and is invalid. In his brief in support of the petition for writ of mandate, Jentz referred to the action as a " 'traditional' or " 'ordinary' mandate action" under Code of Civil Procedure section 1085 and ignored the other causes of action in his pleading. Likewise, the court in its order denying the petition and the judgment viewed the proceeding as presenting only a petition for writ of mandate under Code of Civil Procedure section 1085. The record and briefing on appeal do not reveal the disposition of the other causes of action, but they were necessarily defeated by the order and judgment denying the petition for writ of mandate.

decision was arbitrary, capricious or entirely lacking in evidentiary support, contrary to established public policy or unlawful or procedurally unfair, are essentially questions of law. With respect to these questions the trial and appellate courts perform essentially the same function, and the conclusions of the trial court are not conclusive on appeal." (*Mike Moore's 24-Hour Towing, supra*, 45 Cal.App.4th at p. 1303.) The only exception is that the trial court's findings on foundational matters of fact are conclusive on appeal if supported by substantial evidence. (*Ibid.*)

In reviewing an appeal in a legislative mandamus action, our "function is to determine whether the exercise of legislative power has exceeded constitutional limitations. The inquiry is whether the record shows a reasonable basis for the action of the legislative body, and if the reasonableness of the decision is fairly debatable, the legislative determination will not be disturbed. . . . [T]he petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law." (*Mike Moore's 24-Hour Towing, supra*, 45 Cal.App.4th at pp. 1305-1306.) "Where a legislative decision is under review, the courts 'will tend to defer to the presumed expertise of the agency acting within its scope of authority.'" (*Id.* at p. 1306.) " ' "There is also a presumption that the board ascertained the existence of necessary facts to support its action, and that the 'necessary facts' are those required by the applicable standards which guided the board." ' ' " (*Ibid.*)

### *Traffic Impacts of the UCSP*

Jentz's argument that the UCSP violates the Initiative focuses primarily on the following language in section 19.80.030 of the Initiative: "The city council shall ensure

that the revised general plan will have a specific element known as the 'public services and facilities element.' The purpose of the element is to ensure development shall not occur in the city of Chula Vista that would degrade existing public services and facilities below acceptable standards until all additional necessary public services and facilities required for that development are assured or scheduled for timely completion as determined by the city council in accordance with but not limited to the following criteria: [¶] A. If the existing major city streets and thoroughfares do not have the capacity to accommodate the proposed development without substantially altering existing traffic patterns or overloading the existing street system, then construction or widening of a major link or links in the major traffic network shall be staged as necessary to ensure the quality of existing traffic flow is maintained."<sup>6</sup>

Jentz contends that section 19.080.030(A) "sets out a hard-and-fast rule." He essentially argues that the city council's resolution certifying the FEIR for the UCSP shows the UCSP's noncompliance with that rule because it contains findings that "[t]he UCSP will cause significant circulation impacts to intersections and roadway segments" and that "[a] substantial increase in traffic on area roadways and at area intersections will result from planned population growth in the urban core over the next 25 years." Jentz argues that because the FEIR states that within the City's urban core "the goal is to achieve [LOS] D or better at all signalized and unsignalized intersections" and that

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<sup>6</sup> The other criteria listed in section 19.80.030 address drainage facilities, water storage and distribution systems, parks and recreation facilities, fire and police protection, school districts, libraries, and sewage.

operation below LOS E on certain roadway segments constitutes a "significant [environmental] impact," the city council effectively found that approval of the UCSP would degrade traffic in and around the area of the UCSP to below LOS C, the level required by the GMO. Thus, Jentz argues, the Initiative is violated because the "quality of existing flow" would be *degraded* rather than "maintained" as section 19.80.030(A) requires.

" 'In interpreting a voter initiative . . . , we apply the same principles that govern statutory construction. [Citation.] Thus, "we turn first to the language of the [initiative], giving the words their ordinary meaning." [Citation.] The [initiative's] language must also be construed in the context of the statute as a whole and the [initiative's] overall . . . scheme.' [Citation.] 'Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language.' " (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037.)

However, " '[t]o seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results. Rather, it is to discern the sense of the statute, and therefore its words, *in the legal and broader culture*. Obviously, a statute has no meaning apart from its words. Similarly, its words have no meaning apart from the world in which they are spoken.' [Citation.] We do not interpret the meaning or intended application of a legislative enactment in a vacuum. In the case of a voters' initiative statute, too, we may not properly interpret the measure in a way that the electorate did not

contemplate: the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

The first sentence of section 19.80.030 on its face unambiguously directs the city council to include a "public services and facilities element" in the City's revised general plan. The sentence following that directive is not a model of clarity. It begins by stating the purpose of the general plan's public services and facilities element (to ensure that development shall not occur in the City that would degrade existing public services and facilities below acceptable standards until all additional necessary public services and facilities required for that development are assured or scheduled for timely completion), and concludes by setting forth various *criteria* (i.e., standards)<sup>7</sup> for the city council to use in designing a public services and facilities element that effectuates that purpose, or perhaps to use in determining, once the mandated public services and facilities element is in place, whether a particular development complies with the anticipated requirement in *that element* that the "additional necessary services" required for a development have been assured or scheduled for timely completion. In any event, section 19.80.030(A) itself does not directly limit future development approvals or specific plans under Government Code section 65450 et seq.; it requires the city council to adopt a revised general plan that does so.

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<sup>7</sup> The definition of "criterion" is "a standard on which a judgment or decision may be based." (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 296, col. 2.)

As noted, Government Code section 65454 provides that "[n]o specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan." Jentz has not argued that the UCSP is inconsistent with the City's 2005 general plan, and we note that it is not. The general plan specifically authorizes the vehicular traffic restrictions in the urban core projected by the FEIR for the UCSP. Vehicular traffic is addressed in the general plan's "Land Use and Transportation Element," and traffic in the City's urban core is addressed in a subpart of that element entitled "Urban Core Circulation Element."

The Urban Core Circulation Element of the general plan explains that the objective, expressed in section 19.80.030(A) of the Initiative, in maintaining the quality of existing vehicular traffic flow in areas of increased residential development does not apply to urban core development the same way it does to development in other areas of the City. The Urban Core Circulation Element states: "Traditional LOS methodologies and traffic study guidelines often favor improved automobile flow, which may have a negative impact on pedestrian and transit mobility, and have the unintended effect of limiting development opportunities in more developed areas. The Urban Core Circulation Element, however, recognizes that the automobile is just one of several modes of travel that can move people in urbanized environments, and that more intensive developments in built-up areas *should not be constrained by policies that focus exclusively on moving vehicular traffic.*

"The overall goal of the Urban Core Circulation Element is to support the development of great places and neighborhoods by providing transportation choices and

supporting those choices with attractive, safe, convenient, and functional infrastructure for all modes of travel. The Urban Core Circulation Element provides opportunities to make policies and standards sufficiently flexible to support Transit Oriented Development (TOD) in select transit corridors and town centers while maintaining the commitment of new development to mitigate impacts of new travel demand and to improve the transit, pedestrian and bicycle environment.

"The Urban Core Circulation Element recognizes that in certain corridors and centers served by transit, *it is acceptable to reduce the vehicle level of service standards that are applied to suburban areas of the City under certain circumstances.* . . . The Urban Core Circulation Element promotes the use of revised level of service standards, alternative ways of measuring level of service for vehicles, and possibly establishing level of service criteria and performance standards for other modes of travel." (Italics added.) The Urban Core Circulation Element later states that it "follows the precedent of California Senate Bill 1636 (which allows for relaxing of LOS standards in 'infill opportunity areas') and the City of San Diego, which has established a performance standard of LOS E for streets in their Centre City District." The Urban Core Circulation Element concludes: "[B]ecause of existing and projected future land use patterns in the City, there is a strong distinction between the operating characteristics of the street systems within and outside of the Urban Core Subarea. The LOS and volume standards in the City's Circulation Plan will be applied throughout Chula Vista, with special considerations in the Urban Core Subarea, *where LOS E will be acceptable. LOS E is appropriate in the Urban Core Subarea* because development will have a more urbanized

character, and physical constraints exist, such as limited area to expand rights-of-way. Also, the change in performance standards will help balance and serve all transportation modes (i.e., Transit, pedestrian, bicycling, etc.) and will avoid the disruptive effects of widening streets in a built environment."<sup>8</sup> (*Italics added.*)

The traffic projections of the FEIR for the UCSP show that the UCSP is consistent with the general plan, despite the traffic issues Jentz raises. The FEIR concluded that despite various specified mitigation measures, as to three intersections and one roadway segment, impacts of the UCSP "would remain significant and unavoidable,"<sup>9</sup> based on projections to the year 2030. However, the FEIR concluded that as to one of those intersections (Broadway and H Street) the recommended improvements would improve the intersection from LOS F to LOS E. The FEIR further concluded that with *no improvements*, the other two intersections (Hilltop Drive and H Street and Third Avenue and J Street) would remain at LOS E during peak periods. As noted, under the Urban

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<sup>8</sup> Jentz could have challenged the City's general plan on the ground it is inconsistent with the Initiative because it authorizes development in the urban core that is projected to restrict rather than maintain vehicular traffic flow. However, under Government Code section 65009, subdivision (c), the time to challenge the 2005 amended general plan expired 90 days after the city council adopted it. The limitations bar contained in Government Code section 65009, subdivision (c) is absolute. (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1114-1115, 1123.)

<sup>9</sup> The three intersections for which traffic impacts from the UCSP will remain "significant and unavoidable" despite mitigation measures according to the FEIR's projection to the year 2030 are: No. 27 (Broadway and H Street), No. 23 (Hilltop Drive and H Street) and No. 54 (Third Avenue and J Street). The roadway segment for which traffic impacts will remain significant and unavoidable despite mitigation measures is Third Avenue between E and G streets.



Core Circulation Element of the City's general plan, LOS E is acceptable in the urban core in the interest of creating an improved public transit, pedestrian and bicycle environment.

Regarding the roadway segment of Third Avenue between E and G streets, the FEIR states: "Third Avenue between E Street and G Street would be constructed as a two-lane downtown promenade to facilitate an enhanced pedestrian environment along the traditional commercial village. As a result, the acceptable [average daily vehicle trips] along the segment would decrease and result in an unacceptable LOS. As such, impacts to Third Avenue will be significant and unavoidable" However, regarding those significant and unavoidable impacts, the FEIR further stated: "Although the planned improvements would result in an unacceptable LOS, the planned improvement to Third Avenue has *overriding benefits toward meeting the project objectives of creating a more pedestrian friendly and active streetscape that accommodates multi-modes of transportation rather than just accommodating the automobile*. Although the turning volumes in this segment of Third Avenue are less than other segments in the corridor, turning lanes are proposed to remove turning traffic from the through traffic. Turning vehicles would yield to anticipated high pedestrian traffic volume and the turn lanes allow these yielding vehicles to pull out of the through travel lanes and allow a right-turn lane and a left turn lane to be provided. The intersection configuration would adequately accommodate future traffic demands along Third Avenue while providing a significantly enhanced pedestrian friendly streetscape. *Measures to reduce traffic impacts to this*

*roadway segment to below significance would be counterproductive to achieving the socially beneficial goal of safe, walkable streetscapes."* (Italics added.)

Thus, despite what Jentz views as the UCSP's "degradation" of traffic in the urban core, the UCSP is consistent with (1) the general plan's objectives of supporting "the development of great places and neighborhoods by providing transportation choices and supporting those choices with attractive, safe, convenient, and functional infrastructure for all modes of travel;" (2) the general plan's recognition "that intensive developments in built-up areas should not be constrained by policies that focus exclusively on moving vehicular traffic;" and (3) the general plan's conclusion that "LOS E is appropriate in the Urban Core Subarea because development will have a more urbanized character, and physical constraints exist, such as limited area to expand rights-of-way." Accordingly, the city council's adoption of the UCSP was not arbitrary, capricious, entirely lacking in evidentiary support, or unlawful.

Jentz notes that section 19.80.080 of the Initiative directs the city council "to adopt such further ordinances, resolutions, policies or procedures consistent with the purposes, intents and requirements of [this] ordinance." He contends that specific plans are the sort of "ordinances, resolutions, policies or procedures" that must be consistent with the "purposes, intents and requirements" of the Initiative. Section 19.80.080's general directive "to adopt such further ordinances, resolutions, policies or procedures consistent with the purposes, intents and requirements" of the Initiative does not change the plain meaning of the language of section 19.80.030, which does not directly limit future development approvals or specific plans but rather requires the city council to adopt a

revised general plan that does so. Nor does section 19.80.080's directive to adopt future legislation consistent with the Initiative convert the traffic *criterion* specified in section 19.80.030(A) for the public service and facilities element of the general plan into a restriction on future specific plans that are consistent with the City's unchallenged general plan and that the city council reasonably concludes will enhance, rather than degrade the quality of life in the City.

Jentz also suggests that section 19.80.040(A) of the Initiative required the city council to secure all advanced funding for public service and facility costs anticipated to arise from the UCSP before approving the UCSP. Section 19.80.040(A) states: "The city council shall require that any individual, partnership, joint venture or corporation receiving approval of a tentative subdivision map or any other discretionary approvals for any development project shall assure all funds necessary to meet public services and facility element needs and assure developer's participation in the timely construction and financing of facilities." Jentz argues that this language applies to the council's approval of the UCSP because definition of "discretionary planning approval" *in the GMO* includes "legislative actions such as zone changes, general plan amendments, sectional planning area plans or general development plan approval or amendment."

(§ 19.09.020(C).)

Section 19.80.040(A) addresses the city council's obligations in granting "discretionary approvals for any *development project*" (italics added) granted to private developer entities, including "any individual, partnership, joint venture or corporation;" it does not impose requirements on the city council for the approval of a specific plan that

lays the groundwork, including zoning changes, for future developments, the exact nature of which are unknown at the time the plan is adopted. The definition in the GMO of "discretionary planning approval," which includes "legislative actions such as zone changes, general plan amendments, sectional planning area plans or general development plan approval or amendment" (§ 19.09.020(C)), is for purposes of the GMO only;<sup>10</sup> it is not a definition of "discretionary approvals for any development project" as that term is used in section 19.80.040(A) of the Initiative. In any event, section 19.80.040 directs the city council to require that *the entity receiving approval for a discretionary development project* secure and assure the funding for public service and facility improvements necessitated by the project – i.e., *the developer* "shall assure [(1)] all funds necessary to meet public service and facility element needs and [(2)] assure developer's participation in the timely construction and financing of facilities." Section 19.80.040(A) does not require the city council, before adopting a long-range specific plan like the UCSP, to secure the funding for all the public service and facility improvements that are likely to be needed if the long-range plan comes to full fruition. The UCSP is a zoning tool for future development generally; it is not an approval of any particular development project or projects subject to the funding requirements of section 19.80.040.

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<sup>10</sup> The GMO comprises chapter 19.09 of the City's Municipal Code; the Initiative is set forth as chapter 19.80. Section 19.09.020 of the GMO, entitled "Definitions," states: "Wherever the following terms *are used in this chapter*, they shall have the meaning established by this section . . . ." (Italics added.) The definitions in section 19.09.020 were not made applicable to the entire Municipal Code.

Jentz argues that the UCSP violates the GMO in various ways. First, he notes the GMO requires the City to maintain LOS C or better on all signalized arterial segments (except during peak hours), but the city council certified the UCSP's FEIR, which treats the traffic impacts of approving the UCSP as "insignificant" if they do not reduce traffic flow below LOS D. Jentz also notes that the GMO provides that "[c]irculation improvements should be implemented prior to anticipated deterioration of LOS below established standards." (§ 19.09.040(I)(3)(e).) The GMO also provides that no "discretionary planning approvals shall be granted unless the city council finds that the project is consistent with an approved [public facilities financing plan], an air quality improvement plan, and a water conservation plan." (§ 19.09.050(F).) Jentz suggests that the UCSP violates these provisions of the GMO, as well as the Initiative, because the ordinance adopting the UCSP acknowledges that the funding for certain traffic mitigations will follow in the year following adoption of the UCSP.

The Initiative does not contain language requiring that funding for traffic mitigations that are anticipated to be needed as a result of a specific plan be in place before any development under the plan occurs; it requires that funding for public services and facilities necessitated by a *specific development* be "assured" before that development occurs. (§§ 19.80.030, 19.80.040.) To the extent the GMO, which is not an initiative ordinance adopted by the voters, is irreconcilably inconsistent with either the City's 2005 general plan or the UCSP, the general plan and the UCSP control. The power of a city to legislate includes the power to amend or repeal existing legislation, and although repeal by implication is not favored, it is settled that subsequent legislation effects repeal or

amendment of former legislation to the extent the two are irreconcilable. (*Collier v. City and County of San Francisco* (2007) 151 Cal.App.4th 1326, 1351; *Peatros v. Bank of America NT&SA* (2000) 22 Cal.4th 147, 167-168 [if court cannot harmonize a statutory provision with later statutes, it will "recognize that the earlier statutory provision has been impliedly amended or even repealed by the later statutes in order to bring the conflict to resolution"].) Moreover, the general plan is the City's " "constitution" for future development' [citation] located at the top of 'the hierarchy of local government law regulating land use.' " (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773.) As such, it necessarily supersedes any prior inconsistent ordinance enacted by the local legislative body.

Reading the Initiative as a whole, as we are required to do (*Professional Engineers in California Government v. Kempton, supra*, 40 Cal.4th at p. 1037), we conclude that the UCSP, with respect to traffic, is not inconsistent with the Initiative but rather furthers its overall purpose of "ensur[ing] that rampant, *unplanned* development does not overtax facilities and *destroy the quality and home town character of Chula Vista.*" (Italics added.) (§ 19.08.020(A).) Section 19.80.030(A) refers to the "construction or widening of a major link or links in the major traffic network . . . *as necessary to ensure the quality of existing traffic flow is maintained*" if a proposed development would "overload[] *the existing street system.*" (Italics added.) The city council could reasonably conclude that it is not necessary under the general plan to maintain the existing vehicular traffic flow in urban core areas like the above-noted intersections and roadway segment addressed in the FEIR for the UCSP because the general plan

contemplates a major design change in those areas from an automobile-oriented environment to a pedestrian and bicycle friendly environment with increased focus on public transit. Further, the council could reasonably conclude that a specific plan involving the restriction of vehicular traffic in a particular area in favor of a more pedestrian and bicycle friendly environment does not constitute "overloading" of the street system in that area within the meaning of the Initiative.

The general plan and UCSP's objective of sacrificing the efficient movement of vehicular traffic in specified urban core areas for the purpose of creating aesthetically pleasing, pedestrian friendly environments is consistent with the Initiative's purpose of ensuring that *planned* development will promote and further, rather than destroy, the quality and "home town" character of the City. It would be inconsistent with that purpose to mechanically apply the Initiative to declare illegal a development that restricts and reduces the flow of automobile traffic in the interests of achieving the socially beneficial goal of safe, walkable streetscapes that accommodate multiple modes of transportation and not just the automobile.

Notwithstanding the constitutional and statutory limitation on the City Council's authority to amend the Initiative ordinance,<sup>11</sup> "judicial decisions have observed that [a legislative] body is not thereby precluded from enacting laws addressing the general subject matter of an initiative. The [legislative body] remains free to address a 'related but distinct area' [citations] or a matter that an initiative measure 'does not specifically authorize or prohibit.'" (*People v. Kelly* (2010) 47 Cal.4th 1008, 1025-1026.) The Initiative does not specifically prohibit the city council from adopting a specific plan that creates a pedestrian and bicycle friendly development area that enhances the quality of life at the expense of slowing down and restricting the flow of vehicular traffic in that area. Such a reasoned trade-off for the overall benefit of the City is neither the sort of "intense residential development which adversely affects the health, safety and welfare of the citizens of Chula Vista," nor the sort of "rampant, unplanned development" threatening to "overtax facilities and destroy the quality and home town character of Chula Vista" that the Initiative was intended to prohibit. (§§ 19.80.010(B), 19.80.020(A).) We conclude that projected traffic impacts of the UCSP do not render the city council's decision to adopt the UCSP arbitrary, capricious, or unlawful.

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<sup>11</sup> California Constitution, article II, section 10, subdivision (c) states that "The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." Elections Code section 9217 provides: "No ordinance that is either proposed by initiative petition and adopted by the vote of the legislative body of the city without submission to the voters, or adopted by the voters, shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance."



### *UC-15 Zoning*

Under the UCSP, UC-15 is a the subdistrict of the Urban Core district designated as the "E Street Trolley (Transit Focus Area)." Before the adoption of the UCSP, the area comprising UC-15 included the following three zones: Visitor Commercial (CV), Apartment Residential (R3), and Limited Industrial (IL). The area zoned R3 was removed from UC-15 to avoid violating the provision of the Initiative that limited the rezoning of property designated for residential development to the next highest residential density category in any two-year period. Under the UCSP, the zoning in UC-15 would be changed to mixed use allowing a maximum of 90 percent residential use and 10 percent commercial use (retail, office, or hospitality).

Jentz contends this zoning change violates the Initiative provision that "[r]ezoning commercial or industrial property to residential shall be permitted only to the maximum residential density corresponding to the potential traffic generation that was applicable prior to the rezoning to residential." (§ 19.80.070(D).) In supplemental briefing to the trial court on this issue, Jentz argued that, based on traffic impact analysis in the FEIR for the UCSP, the zoning change in UC-15 would increase traffic from 60 daily vehicle trips per 1,000 square feet of land to at least 72.5, and potentially to 92.5 daily vehicle trips.

The City contends, and the trial court found, that Jentz failed to exhaust his administrative remedies with respect to his argument that the zoning change in UC-15 violates section 19.80.070(D) of the Initiative. Jentz argues that he exhausted his administrative remedies on the UC-15 issue because his counsel raised it orally before the city council. We decline to address the exhaustion issue. Assuming, without deciding,

that Jentz exhausted his administrative remedies, we conclude there was sufficient evidentiary support for the City's determination that the UCSP's zoning change in UC-15 does not violate section 19.80.070(D) of the Initiative.

As noted, if the reasonableness of a legislative decision is fairly debatable, we will not disturb the legislative determination, and we will presume the legislative body or agency ascertained the existence of necessary facts to support its action. (*Mike Moore's 24-Hour Towing, supra*, 45 Cal.App.4th at pp. 1305-1306.) In a traditional mandate proceeding, "the determination whether [an agency's] decision was arbitrary, capricious or entirely lacking in evidentiary support must be based on the 'evidence' considered by the administrative agency." (*Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, 387, fn. 13; *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, 233-234.) Accordingly, our determination of whether the city council's decision to adopt the UCSP was arbitrary, capricious or entirely lacking in evidentiary support must be based on the evidence considered *by the city council* when it made its decision.

Jentz first raised the issue of whether UC-15 violated section 19.80.070(D) in a letter from his counsel to the city council dated April 26, 2007, the day the council first voted to adopt the UCSP. The letter stated, in relevant part: "[T]here remain inconsistencies between certain zoning designations and the Cummings Initiative, especially in the mixed use areas. These inconsistencies have not [been] adequately addressed in the EIR for this project. For example, the proposed UC-15 designation rezones property currently in the CB, CV, R-3, and other zones, in a manner contrary to

section 19.80.070 D of the municipal code. This zoning conflict and increase in potential traffic generation has not been analyzed or acknowledged."

In a city council meeting held that day, the City's planning manager addressed the issue Jentz raised by referring to an "Analysis of [the Initiative] and the Urban Core Specific Plan" prepared by City staff and referred to as "Attachment 6." Regarding section 19.80.070(D), Attachment 6 states: "Based on standard traffic generation rates,<sup>[12]</sup> commercial and office uses generate significantly greater traffic than residential uses. For example, an existing 10,000 square foot (sf) site zoned Central Commercial (CC) would have the potential to develop a 15,000 square foot building. This is based on the CC zone's existing development standards which allow 50% lot coverage (50% x 10,000 sf site = 5,000 sf) and up to a three story height limit (3 stories x 5,000 sf per floor). Using standard traffic generation rates for commercial uses (40 trips /1,000 square feet); a total of 600 trips would be generated from a commercial building of that size.

"Based on the criteria in section [19.80.070(D)], the maximum residential density could not be more than the potential traffic generated by the commercial use (i.e. 600 trips). This equates to up to 100 multi-family units (600 trips/6 trips per dwelling unit) on the 10,000 sf site, or 450 dwelling units per acre. Because commercial and office uses generate significantly greater traffic than residential uses, a zone change from

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<sup>12</sup> In a footnote at this point, Attachment 6 identifies the source of the "standard traffic generation rates" as the "SANDAG 2002 Brief Guide of Vehicular Traffic Generation Rates for The San Diego Region."

commercial to a multi-family residential category could never result in residential traffic generation greater than the corresponding potential traffic generation from a commercial development. Therefore, zone changes from commercial to residential would not conflict with [section 19.80.070(D)]." (Fns. omitted.)

As noted, section 19.80.070(D) provides that "[r]ezoning commercial or industrial property to residential shall be permitted only to the maximum *residential density* corresponding to the potential traffic generation that was applicable prior to the rezoning to residential." (Italics added.) Attachment 6 states that "[b]ased on the criteria in section [19.80.070(D)], the maximum *residential density* could not be more than the potential traffic generated by the commercial use (i.e. 600 trips)." (Italics added.) This statement indicates that the City staff analyzing the applicability of section 19.80.070(D) to the zoning change in UC-15 interpreted 19.80.070(D) as limiting only the *residential density* resulting from a UCSP zoning change from commercial to residential to the potential traffic generated by the former commercial use.<sup>13</sup>

The City staff's interpretation is not unreasonable. Section 19.80.070(D) addresses rezoning property from commercial or industrial to residential, or from residential to commercial or industrial; it does not specifically address the rezoning of commercial property to a mixed residential-commercial use like the rezoning in UC-15. Thus, whether section 19.80.070(D)'s limitation on rezoning from commercial to residential

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<sup>13</sup> In supplemental briefing to the trial court, the City specifically argued that "on its face, section 19.80.070(D) only requires that the maximum *residential density* of the rezoned area be taken into consideration."

applies to the rezoning in UC-15 and, if it does, whether only the *residential density* in the new mixed-use zone is limited to the corresponding potential traffic generation applicable before the rezoning are issues on which reasonable minds may differ.<sup>14</sup>

Jentz first challenged the staff analysis in Attachment 6 at oral argument on his writ petition and first presented his calculations to rebut it in the supplemental briefs the trial court allowed the parties to file on the issue, long after the city council adopted the UCSP. Thus, the staff analysis in Attachment 6 provided uncontroverted evidentiary support for the city council's determination that the UCSP's zoning changes from commercial to residential would not conflict with section 19.80.070(D). Considering that

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<sup>14</sup> The parties' differing views regarding the applicability of the limitation in section 19.080.070(D) to a rezoning from commercial to mixed use are further reflected in their supplemental briefing in the trial court on the UC-15 issue. The UCSP allows for high rise mixed-use buildings in UC-15 up to 210 feet high. The parties calculated that a 210-foot building would be 16.4 stories high. (In supplemental briefing, Jentz pointed out that under the City's Municipal Code, 45 vertical feet equates with 3.5 stories or 12.8 feet per story.) With a maximum lot coverage of 60 percent, the total square footage of a 16.4 building would be 98,400 (6,000 square feet x 16.4). Using Jentz's figure of 1,000 square feet per dwelling unit in the building, the City calculated the maximum number of residential units such a building could contain to be 98.4 dwelling units. Based on the SANDAG 2002 Brief Guide of Vehicular Traffic Generation Rates for the San Diego Region, the City calculated six daily vehicle trips per dwelling unit to arrive at the figure of 590.4 trips, which is less than the 600 daily trips potentially generated by the lot under the pre-UCSP commercial zoning.

Jentz's calculations arrive at a figure higher than 600 daily trips resulting from a 210-foot building in UC-15 because his analysis assumes that 10 percent of the building's use will be commercial, based on the rezoning of UC-15 to a maximum of 90 percent residential and 10 percent commercial. Thus, he assumes 9,840 square feet of commercial space in a 98,400 square foot building. Applying the commercial trip factor of 40 daily trips per 1,000 square feet, Jentz calculates the building would generate 394 daily commercial trips, plus 528 residential trips (based on 88 dwelling units and 6 daily trips per unit), for a total of 922 daily trips.

we must base our determination of whether the city council's decision to adopt the UCSP was arbitrary, capricious or entirely lacking in evidentiary support on the evidence considered *by the city council when it made its decision* (*Lewin v. St. Joseph Hospital of Orange, supra*, 82 Cal.App.3d at p. 387, fn. 13), and that the applicability of section 19.80.070(D) to the rezoning in UC-15 presents ordinance interpretation issues on which reasonable minds may differ, we conclude the city council's determination that the rezoning in UC-15 did not violate section 19.80.070(D) was not arbitrary, capricious, entirely lacking in evidentiary support, or contrary to law.

Jentz's argument that the City's adoption of the UCSP violates elementary principles of administrative law because it is not internally consistent and logical, is not consistent with applicable law, and is not supported by substantial evidence in the record essentially reiterates his argument that the city council's adoption of the UCSP violates the Initiative and GMO. Because the record shows that the reasonableness of the city council's decision to adopt the UCSP is at least "fairly debatable," and not arbitrary, capricious, lacking in evidentiary support, or unlawful, we will not disturb the council's legislative determination. (*Mike Moore's 24-Hour Towing, supra*, 45 Cal.App.4th at p. 1306.) Jentz has not met his burden of showing that the city council's decision was unreasonable or invalid as a matter of law. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

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NARES, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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HALLER, J.